United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original - Affidavit of mailing

74-1181

To be argued by
DAVID A. DEPETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1181

B

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH RUBIN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
DAVID A. DEPETRIS,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1181

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH RUBIN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Joseph Rubin appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (John R. Bartels, *J.*), entered March 30, 1973, after a jury trial, which convicted appellant of conspiracy to distribute cocaine in violation of Title 21, United States Code, Sections 841(a)(1) and 846. Appellant was sentenced to eighteen months imprisonment and a special parole term of five years. Execution of the sentence was stayed pending appeal and appellant is presently at large on bail.

Also named in the indictment as co-defendants were Dennis Mayer and Mitchell Sorkin. Sorkin pled guilty prior to trial. Mayer was tried with appellant and was

also convicted.* Mayer was sentenced to eighteen months imprisonment and a special parole term of five years on each count to run concurrently. Subsequently, his term of imprisonment was reduced to one year. Mayer chose not to appeal his conviction.

Appellant argues on appeal (1) that he was deprived of his Sixth Amendment right to the effective assistance of counsel, (2) that the conduct of the District Court was so prejudicial as to deprive him of a fair trial, and (3) that the District Court erred in its charge on the element of guilty knowledge. Appellant does not challenge the sufficiency of the evidence upon which he was convicted.

Statement of Facts

The Government's case was based primarily on the testimony of two undercover agents, Lawrence McElynn and Tom Sheehan, of the Bureau of Narcotics and Dangerous Drugs.

(1)

On March 21, 1972, Agent McElynn, acting in an undercover capacity, began negotiations with one Anthony Lawless ** for the purchase of cocaine. Lawless advised McElynn that he had made arrangements to receive two samples of cocaine from different individuals for the agent's inspection and that one of the samples was from a package priced at $1,000-$1,200 per ounce. Lawless and McElynn agreed to meet that afternoon at Cleanland, 108th Street, Queens, New York, Lawless' place of employment (T. 104, 111-112).***

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* The indictment charged appellant and Mayer with conspiracy to distribute cocaine and Mayer with two additional counts of distributing cocaine. The jury convicted both of all crimes charged.

** Lawless was named as a co-conspirator but not as a defendant in the indictment.

*** References to "T" are to pages of the trial transcript.

Lawless supplied Agents McElynn and Sheehan with a sample of cocaine which they rejected. Lawless produced a second sample later that afternoon and the agents agreed to purchase one ounce of that cocaine for $1,000 (T. 112-116).

After a discussion with Lawless, Agent McElynn met Sorkin and Mayer and the three discussed the final arrangements for the transaction while en route to the delivery point. After discussing the quality of their merchandise with Agent McElynn, Sorkin and Mayer advised that their "people" had ⅛ kilo of cocaine for sale for $3,900 and that the sample McElynn received from Lawless had come from that package. The cocaine transaction fell through because Mayer's source did not want to break the ⅛ package into ounces and Agent McElynn only had enough money to purchase the ounce. Mayer and Agent McElynn did exchange telephone numbers for possible future transactions (T. 116-119, 121-129, 139).

Mayer telephoned Agent McElynn over the next few days advising him that he would have some cocaine to sell in the near future (T. 130-133). As a result of these conversations, on March 30, 1972, Agents McElynn and Sheehan met with Mayer and discussed an upcoming trip to Florida where Mayer would purchase ten pounds of cocaine. After receiving a sample which Mayer said was similar in quality to the cocaine from Florida, McElynn attempted to order three pounds at a price of $9,000 per pound, but Mayer would only sell him eight ounces since most of the merchandise had already been pledged to other people. Mayer then told Agent McElynn that because he was leaving for California and Hawaii shortly, appellant would handle the arrangements for the Florida cocaine deal. Before leaving, Mayer gave McElynn appellant's address and telephone number (T. 134-137, 141-144).

On March 31, 1972, appellant telephoned Agent McElynn and told him to come to appellant's apartment that evening to discuss the Florida deal and also to receive a cocaine sample. That evening, at appellant's apartment in Manhattan, McElynn and Sheehan discussed the trip to Florida, and the proposal that either McElynn or Sheehan might accompany appellant to Florida to test the cocaine.* Appellant explained that there might be a problem arranging for one of the agents to go to Florida since "Jerry", the individual who was to purchase the cocaine in Florida, did not want to meet anyone. Appellant suggested that if he acted as a buffer between "Jerry" and the agents, McElynn could probably travel with "Jerry" and appellant to Florida. During the meeting, appellant gave Agent McElynn a sample of cocaine. After some further discussion, the agents left (T. 147-152).

The following day, appellant called Agent McElynn to tell him that arrangements had been made for McElynn to meet "Jerry" on Monday, April 3rd to discuss the Florida trip. On Monday, appellant telephoned and said that he had spoken to Mayer and that Mayer had decided to handle the deal himself and would contact McElynn after returning from California (T. 153-154, 170).

On April 13, 1972, Mayer contacted McElynn and told him that the reason he had not been in touch with McElynn sooner was that one of the people in Florida had been injured and, as a result, Mayer and his associates were very nervous and could not obtain the cocaine. There was no further contact with any of the defendants (T. 155-157). Several months later, appellant, Mayer and Sorkin were arrested by agents of the Drug Enforcement Administration.

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* The original proposal that Agent McElynn also go to Florida to test the cocaine to be purchased by Mayer's source was made at the meeting between Mayer and the agents the day before after Mayer saw Agent Sheehan test the cocaine (T. 142).

(2)

Appellant testified that he had been a writer for several years and had on several occasions over the years written articles for magazines on the subject of drugs. In 1972, appellant engaged in research for a book on human sexuality and a portion of the book was to deal with the effect of drugs, both licit and illicit, on human sexuality. After speaking to potential publishers, appellant was asked to expand the section on drugs. In an attempt to do this, appellant interviewed several people but had very little success at gaining information from them * (T. 228-233, 238-240, 271-288).

In October 1971, appellant met Dennis Mayer, a candlemaker, and they became friends in the next few months. At some point, after Mayer had told appellant that he had literary ambitions, appellant told Mayer of the problem he was having obtaining valid information about drugs. Appellant testified that he and Mayer agreed that Mayer would attempt to find people involved in the distribution of cocaine for appellant to interview (T. 242-245). Appellant testified that because they continued to experience difficulty in obtaining interviews, he and Mayer decided to contact pushers and "pretend" that they had drugs to sell. Appellant testified that they had no success with this scheme until Mayer called appellant and said he had met two people who seemed to be high in the echelon of narcotic trafficking and that appellant would hear from them soon. These two individuals turned out to be Agents McElynn and Sheehan. Appellant and Mayer had obtained five samples that were supposed to be procaine and sugar from one Celine Oppenheim, a friend, which they passed

* Appellant had met these people in bars, at his apartment and in the park. In many instances, appellant could not remember their names.

as cocaine in their scheme to obtain narcotic trafficking information (T. 248-249, 251-252, 255).*

Thereafter, appellant met with the agents in a supposed effort to obtain information as to their narcotic trafficking. At the meeting, appellant gave the agents a sample which, upon analysis, was determined to contain cocaine. A few days later, appellant claimed that he telephoned the agents and told them he would not be dealing with them anymore. After this, appellant abandoned his attempt to gain information from those trafficking in narcotics (T. 256-260, 261, 269).

Appellant admitted that during the course of his research, he had never contacted any agency of the federal or state government for information on narcotics (T. 300, 302). No notes of any of the "interviews" appellant testified he had with narcotics pushers were produced at trial.

Co-defendant Dennis Mayer, a candlemaker, testified in substance that he had met with and delivered samples of what he thought was procaine to the agents, and that this was done as the result of an agreement with appellant whereby Mayer would attempt to find narcotics dealers for appellant to "interview" for his research on narcotics. Mayer did not contact any government agency to obtain information for the research (T. 362-413, 424-480).

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* Celine Oppenheim was not called as a witness at the trial.

ARGUMENT

POINT I

Appellant was not deprived of his Sixth Amendment right to the effective assistance of counsel.

Appellant now claims that his Sixth Amendment right was violated because his attorney did not effectively represent him at the trial. However, a review of the trial record reveals that appellant's argument is lacking in merit.

It is clear that a defendant is denied his constitutional right to the effective assistance of counsel if his attorney represents conflicting interests without his knowledge and consent. However, it is equally clear that when appellant and Mayer were confronted on the morning of trial with the question of a potential conflict, they advised the District Court that they wished to have their attorney continue to represent them both and they expressly waived any conflict which might arise (T. 2-5). *United States* v. *DeBerry,* 487 F.2d 448, 453-454 (2d Cir. 1973). After a further discussion, counsel was appointed to represent Mayer and appellant continued to be represented by his retained attorney, Delavan Smith, Esq. Even after this precaution was taken, appellant's attorney expressed his opinion to the District Court that the procedure was unnecessary.

Appellant now argues for the first time that despite the fact that he and his co-defendant Mayer were represented by separate counsel, appellant was somehow prejudiced by the residual loyalty of his retained counsel to Mr. Smith's former client, Mayer. In pursuing his disingenuous argument, appellant directs this Court's attention to the transcript of a recorded telephone conversation of April 13,

1972, between Agent McElynn and co-defendant Mayer. During this conversation, Mayer corroborated the fact that appellant was a writer (which was never disputed by the Government) and generally the conversation could have been read as minimizing the involvement of appellant. Appellant claims that he was prejudiced by his attorney's failure to cross-examine Agent McElynn or co-defendant Mayer as to this transcript.

Although couched in terms of conflict of interest, appellant's argument seems more to challenge the competency of his retained counsel. It should be noted that in pursuing his argument, appellant does not direct this Court's attention to another telephone conversation, which was also recorded, between McElynn and appellant himself. McElynn testified both on direct and during cross-examination that during this conversation appellant Rubin informed him that Mayer would be handling all dealings from then on and that he (Rubin) "was not going to have any more dealings with us" (T. 154, 170-71). After a reading of the testimony of Agent McElynn, appellant Rubin, co-defendant Mayer and their defense witnesses, it is abundantly clear that the joint defense of Rubin and Mayer was more than adequately presented to the jury.

The cases cited by appellant in support of his argument are not in point. All of the cases cited by appellant deal with a situation where either one attorney represented two defendants at a trial in which a possible conflict arose (see, *e.g., Glasser* v. *United States,* 315 U.S. 60 (1942); *Morgan* v. *United States,* 396 F.2d 110 [2d Cir. 1968]) or one attorney represented a defendant but also had represented or was representing a key Government witness in another matter and therefore possibly may not have investigated or cross-examined sufficiently said witness because of the alleged conflict (see, *e.g., Olsher* v. *McMann,* 378 F.2d 993 (2d Cir.), *cert. denied,* 389 U.S. 874 (1967); *Porter* v. *United States,* 298 F.2d 461 (5th Cir. 1962); *Tucker* v. *United States,* 235 F.2d 238 [9th Cir. 1956]).

Both appellant and Mayer had the same defense to the charges against them. Appellant's defense included the exculpation of Mayer and vice versa. It is clear that their trial strategy was to the effect that each would defend the other. Further cross-examination of Agent McElynn or co-defendant Mayer, as is now suggested by appellant, would have possibly jeopardized their joint defense strategy and could not have improved upon McElynn's somewhat favorable testimony concerning appellant's relatively limited involvement.

POINT II

The conduct of the District Court did not deprive appellant of a fair trial.

Appellant argues that the District Court's conduct denied him a fair trial on two grounds: first, that the District Court improperly limited appellant's opportunity to establish a defense and second, that the District Court evinced a partisan attitude against appellant and a firm belief in his guilt. The Government submits that a reading of the entire record will indicate that the District Court stayed within the bounds of proper judicial conduct by fulfilling its duty "to clarify testimony and assist the jury in understanding the evidence and its task of weighing it in the resolution of issues of fact." *United States* v. *DeSisto,* 289 F.2d 833, 834 (2d Cir. 1961).

Appellant argues that the District Court improperly restricted him from developing at the trial his experience as a writer. At the outset, it must be emphasized that the Government never challenged that appellant was a writer. The Government would submit that the District Court, in its discretion, properly excluded certain proposed testimony of appellant and his witnesses as irrelevant and collateral. On this issue, appellant first points to the District Court's remark referring to proposed testimony

as a "red herring" in the presence of the jury (App. Br. pp. 36-37). After appellant, at a sidebar, explained the purpose of attempting to elicit more detailed testimony concerning his work as a writer, the District Court admonished the jury to disregard completely the Court's remarks (Appendix, pp. 52-57) (T. 233-238). This instruction by the District Court certainly cured any possible error which may have been committed by the District Court.

Appellant next argues that the District Court deprived him of a fair trial by labeling as immaterial the reasons why the drug dealers with whom appellant had allegedly spoken would not give him information concerning their illegal activities. Appellant had testified that these individuals were very nervous and reluctant to speak to him concerning their narcotics dealings because of the "Caldwell decision" which would require appellant to divulge their names. The Government objected to this testimony and the District Court properly instructed the witness to refrain from such comments (Appendix pp. 59-60) (T. 240-241). The District Court's conduct here in no way limited appellant's explanation to the jury of his alleged reasons for attempting to pass himself off as a narcotics dealer (T. 240-243, 248-249).

Appellant next argues that the District Court restricted his defense by not allowing him to testify as to a television script he was working on with a man by the name of Harold Steinberg. The District Court acted properly in excluding certain detailed descriptions by appellant as to his various projects. Appellant had already testified that he was doing research on narcotics trafficking for a book. In addition, Harold Steinberg, a publisher for Chelsea House Publishers, testified as a defense witness that he had discussed with appellant certain ideas for books relating to drugs (T. 522-526).

Appellant finally argues that the District Court improperly restricted the testimony of defense witnesses. An examination of the testimony of these defense witnesses indicates that the District Court allowed them to testify that they had discussed with appellant certain ideas and possible articles and books on the subject of drugs. The District Court, in the exercise of its discretion, properly limited these witnesses to a general description of their discussions with appellant.

The Government did not contest that appellant was a writer. The District Court allowed appellant, through his own testimony and through his defense witnesses, to establish that he had discussed writing certain articles and books on drugs and further allowed appellant to outline his credentials and experience as to a writer. The District Court properly limited some testimony by the defense witnesses and restricted both Government counsel and defense counsel, because the testimony and questioning was collateral to the issues in the case.

Appellant argues that the District Court expressed disbelief of his testimony in the presence of the jury. In an attempt to support this argument, appellant points to certain exerpts from the trial transcript. At pages 28-30 of his brief, appellant argues that the District Court, through its questions, demonstrated a firm belief in appellants guilt. However, an examination of Judge Bartels' remarks clearly indicates that the questions that were asked were for purposes of clarification (T. 238-240). Appellant had testified that upon submission of an outline to presumably some prospective publishers, he had been asked to expand the section on drugs. The Court inquired as to what kind of publication it was. Appellant's attorney responded: "It was to be a book." The Court, at that point, asked: "Was it or was it not a book?" Appellant testified that it was a book and that the contract had been

signed in October and in answer to a question by the District Court said that the book had not been published. There can be no question but that the Court's inquiry was for the purpose of clarifying this testimony and the Court in no way expressed its disbelief in appellant's story.

Appellant next argues that the District Court expressed disbelief in his co-defendant's, Mayer's, testimony and points to two questions asked by the Court (App. Br. p. 30) (T. 366). A reading of even just this portion of the transcript clearly indicates that there was no expression of disbelief in Mayer's testimony.

Appellant further argues that the District Court cross-examined him repeatedly concerning the names and addresses of alleged drug dealers that appellant had interviewed. However, an examination of the transcript indicates that it was Government counsel who began this line of questioning and continued the questioning. The Court's interjections were merely to avoid any confusion and to clarify the names of the individuals mentioned by appellant (T. 270-289).

Appellant next argues that the District Court expressed disbelief in his testimony through questions concerning appellant's knowledge of cocaine and procaine. However, appellant had already expressed knowledge of cocaine and procaine prior to the District Court's question (T. 289-293). Finally, appellant argues that the District Court's questioning about one of appellant's earlier writing assignments prejudiced him. The Government had already questioned appellant concerning this earlier writing (T. 293-295) and the Government had also asked appellant if he had contacted any Government agency to advise them that he was writing a book about narcotics to protect himself and to possibly gain some information from them. Appellant admitted that he had not. In response to the Court's ques-

tions, appellant testified that he did not contact the Government in 1958 when he prepared another article dealing with drugs. The remainder of the questioning was simply for purposes of clarification. It is obvious from a reading of appellant's testimony that he was mentioning several different types of drugs. Further, because the words "procaine" and "cocaine" sound somewhat similar there was some confusion created during his testimony. The District Court's questioning, on the whole, was directed toward avoiding any confusion by the jurors.

In all, the Court's questioning and comments did not approach either the frequency or intensity of the judicial intervention demonstrated in *United States* v. *Fernandez*, 480 F.2d 726 (2d Cir. 1973), or *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973). For the most part, the District Court's limited questioning was for the purpose of clarification of certain testimony and to avoid confusion on the part of the jurors. Appellant clearly placed his defense theory before the jury. He was permitted to establish his credentials as a writer and to establish that certain prospective publishers had discussed with him proposals for drug-related articles and books. Appellant and Mayer explained to the jury, in detail, their plan to gather "first-hand" information for appellant's planned publications. Furthermore, Judge Bartels' very thorough general instruction to the jury blunted any possible prejudicial effect the jury might have felt from any allegedly improper statement. Judge Bartels stated:

> You have heard the evidence. You have heard the arguments of counsel, and now it becomes my duty to give you the law governing this case.
>
> It is your duty, ladies and gentlemen, to accept the law as it is given to you by the Court and to determine the facts of the case for yourselves.

The proper application of the law of the case to the facts of the case as you will find those facts to be will determine your verdict.

I wish to make it very plain to you that the sole responsibility and the sole power in determining these facts depends upon you, and anything I may say or seem to say as indicating any view or any opinion as to the facts is to be completely ignored by you.

In determining the facts, you must not be influenced by any rulings that the Court may have made during the course of the trial.

These rulings dealt with matters of law. They did not deal with questions of fact.

The Court's ruling on an objection made by any of these attorneys and any questions which the Court may have posed to any witness is not to be considered by you as indicating either the guilt or the innocence of these defendants, and the same is true with respect to any reflection of the Court's voice relative to any such matters or in connection with any comments or statements the Court may have made to any of these attorneys.

The Court expresses no opinion as to the guilt or the innocence of these defendants. The determination of such guilt or innocence is a matter that rests exclusively with you.

Appellant received a fair trial. His defense was fully placed before the jury who chose imply not to believe him. Their verdict should stand.

POINT II

The District Court's charge on the element of guilty knowledge was proper.

Appellant now argues for the first time that the District Court committed plain error in its charge on the element of guilty knowledge.* The District Court, in charging the jury on the issue of guilty knowledge, stated as follows:

> It is obviously imposible, ladies and gentlemen, to ascertain or prove directly what a man knew or intended. You and I cannot look into a person's mind and see what his intentions were or what his knowledge was. Physically, that is imposible.
>
> But a careful and intelligent consideration of the facts and the circumstances shown by the evidence in any given case, as to a person's actions and statements, enables us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things, and what was the state of his knowledge.
>
> Knowledge, as I say, may be inferred from the acts of the parties. And it is a question of fact to be determined from all the circumstances.
>
> And the jury may scrutinize the defendants' entire conduct at the time that the offenses were committed.
>
> Of course one may not willfully and intentionally remain ignorant of a fact which is important and material in his conduct.
>
> The test is whether there was a conscious purpose here to avoid enlightenment.

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* Co-defendant Mayer did object to a portion of Judge Bartel's charge on knowledge.

However, mere suspicion that something is wrong or improper is not equivalen to knowledge, nor is it equivalent to an intention.

The proof of the element of knowledge and intent may rest, as it frequently does, on evidence of facts and circumstances from which it clearly appears that the only reasonable and logical inference is that the accused had knowledge of the illegal possession of cocaine.

But circumstantial evidence sufficient to support a charge of knowledge of illegal possession with intent to distribute must be sufficiently persuasive to exclude an inference of innocence (Appendix at 34-35) (T. 648-649).

This Court has recently on two occasions considered the appropriateness of a more elaborate "conscious avoidance" charge in situations similar to the one now presented to this Court. *United States* v. *Olivares-Vega*, — F.2d — (2d Cir.), slip op. 265[illegible], decided April 3, 1974; and *United States* v. *Joly*, — F.2d — (2d Cir.), slip op. 2053, decided March 12, 1974. These cases involved the illegal importation of cocaine by a courier. In *Joly*, this Court stated: "If a person has cocaine in his possession, a legitimate inference arises that he knows what he possess is cocaine . . . Of course, other evidence may weaken the inference . . . But the legitimacy of the basic inference does not automatically disappear because other evidence arguably points the opposite way." *United States* v. *Joly*, *supra* at 2060.

In the instant case, appellant denied knowing that the substance which he passed to the agents was cocaine. Appellant stated that he and Mayer believed that the samples which they had allegedly obtained from one Celine Oppenheim contained procaine and sugar. Further, appellant said that they used the samples to gain the confidence of

drug dealers so that they could obtain information on drug trafficking for a book which he intended to publish. The agents' testimony coupled with the fact that neither appellant nor Mayer produced any notes of interviews with drug traffickers and the peculiar circumstances under which appellant and Mayer testified they obtained the samples would certainly allow the jury to infer that appellant knew that the samples contained cocaine.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

May 8, 1974

EDWARD JOHN BOYD, V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
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Of Counsel.

Form No. USA-33a-4a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH AMUNDSEN, being duly sworn, says that on the 9th day of May 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

John W. Castles, Esq.
Lord, Day & Lord
25 Broadway
New York, New York 10004

Sworn to before me this
9th day of May 1974

Frances A. Grant

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731
Qualified in Queens County
Commission Expires March 30, 1975

Deborah Amundsen

DEBORAH AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____ duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____
_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No. _____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FP!-LC-SM-8-73-7385